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Global Aerospace, Inc. Order on Defendant's Motion to Compel Discovery

Elizabeth E. Long
Superior Court of Fulton County

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA



GLOBAL AEROSPACE, INC.,

Plaintiff,

v.

LIMA DELTA COMPANY, TRIDENTAS,
SOKICAT, TRIDENT AVIATION
SERVICES, LLC, TRIDENT AVIATION
SERVICES LLC, TRIDENT AVIATION
SERVICES, INC., SOCIKAT, SOKICAT – CN
AVIATION, SOCIKAT – CN AVIATION, and
CN AVIATION,

Defendants.

Civil Action File No.
2012CV214772

COPY

**ORDER ON DEFENDANTS' AMENDED MOTION FOR ORDER COMPELLING
DISCOVERY AGAINST PLAINTIFF GLOBAL AEROSPACE, INC.**

This matter is before the Court on Defendants' Amended Motion for Order Compelling Discovery Against Plaintiff Global Aerospace, Inc. filed on May 13, 2014. Upon consideration of the briefs, arguments made at the hearing held on June 27, 2014, subsequent briefing submitted on July 14, 2014, and the record of the case, the Court finds as follows:

At issue is Plaintiff's assertion of various privileges in response to discovery requests first served on Defendants in October of 2012. The privileges were asserted as to several documents in a revised privilege log that was produced in April of 2014¹ and included "self-critical analysis" privilege, attorney-client privilege, and work product privilege. The party opposing the production of documents has the burden of proving that the requested documents are in fact privileged. *See General Motors Corp. v. Conkle*, 226 Ga. App. 34, 46 (1997). The

¹ Plaintiff contends in its supplemental briefing that it supplemented its production of documents after the hearing to include "factual type information obtained in the normal course of investigating the airplane crash" but did not include an updated privilege log. Thus, it is impossible for the Court to determine which specific documents are still being withheld or under which assertion of privilege they are being withheld.

Court finds that Plaintiff has failed to articulate a basis for asserting any of the asserted privileges.

First, Georgia does not recognize a self-critical analysis privilege. *See Lara v. Tri-State Drilling*, 504 F. Supp. 2d 1323, 1328 (N.D. Ga. 2007) (“The narrow approach taken by the Georgia legislature, and the complete absence of the Georgia courts having recognized a self-critical analysis privilege, leads this court to conclude that Georgia law does not allow for such a privilege.”). Therefore, Plaintiff’s Motion to Compel documents for which the self-critical analysis privilege was asserted is **GRANTED**.

Second, Plaintiff has failed to support its assertion of attorney-client privilege for a number of documents that are identified as communications involving three Global employees who have been identified with an “Esquire” designation: Gregory Doctor, David Alfson, and Sharon Holahan. The attorney-client privilege bars the discovery or testimony of confidential communications between a lawyer and his client. O.C.G.A. § 24-5-501; *NationsBank, N.A., v. SouthTrust Bank of Ga., N.A.*, 226 Ga. App. 888, 896 (1997). The attorney-client privilege protects any communication made between the client and the attorney in confidence for the purposes of obtaining legal advice. *See Fisher v. U.S.*, 425 U.S. 391, 403 (1976); *Tenet Healthcare Corp. v. Louisiana Forum Corp.*, 273 Ga. 206 (2000). “Inasmuch as the exercise of the privilege results in the exclusion of evidence, a narrow construction of the privilege comports with the view that the ascertainment of as many facts as possible leads to the truth, the discovery of which is ‘the object of all legal investigation.’” *Tenet Healthcare Corp.*, 273 Ga. at 208.

In support of its supplemental briefing, Plaintiff presents the affidavit of Mr. Doctor, but Mr. Doctor does not assert that his involvement in the airplane crash investigation was anything other than a claims investigation in the ordinary course of claims processing by an insurance company employee. Plaintiff did not provide any evidence that Mr. Doctor's communications were made in confidence for the purposes of obtaining or giving legal advice. While his affidavit asserts that he became liaison to counsel beginning on February 18, the date in which outside counsel was contacted by Global, this fact does not alone confer attorney-client privilege to every communication involving Mr. Doctor. Similarly, Mr. Doctor's affidavit is silent as to the roles played by Mr. Alfson other than to say that Mr. Alfson reported to Mr. Doctor, Mr. Alfson took over the investigation from Kevin Twiss (a person who has not been identified as a lawyer), and Mr. Alfson communicated with Defendant's representative, Mr. DeLisa. Ms. Holahan is not mentioned in the affidavit at all. As Plaintiff has failed to show that any of the documented communications between Doctor, Alfson, or Holahan and others (excluding outside counsel) were communications made in confidence for the purpose of giving or obtaining legal advice, Defendant's Motion to Compel documents withheld on this basis is **CONDITIONALLY GRANTED**.

Finally, Plaintiff has failed to support its assertion that the documents withheld are protected from disclosure under the work product doctrine. O.C.G.A. § 9-11-26(b)(3) establishes the work product protection for materials prepared in anticipation of litigation or for trial. The purpose of the work product protection is to protect the "mental impressions, conclusions, and theories of persons engaged in preparing litigation." *Clarkson Indus., Inc. v.*

Price, 135 Ga. App. 787 (1975). In a similar case, the Court of Appeals determined that the procurement of witness statements and photographs from an accident scene were not privileged materials under attorney work product. *Atl. C. L. R. Co. v. Gause*, 116 Ga. App. 216 (1967). “[T]he better reasoned cases do not extend the work product immunity to statements obtained by claim agents or investigators, even though such statements are obtained more or less under the direct and active supervision of the defendant’s counsel.” *Id.* at 223. Where such photographs and statements “are routinely obtained as a standard practice of investigating accidents,” such documents should not be excluded from discovery. *Id.* at 223. Even though the photographs and statements may have been performed under the supervision of counsel, these acts were nothing out of the ordinary acts performed by an investigator or claim agent. *See id.* at 224.

Here, there is no doubt that all of the parties anticipated some form of litigation following a plane crash that cost several people their lives. However, Plaintiff has failed to show that the documents withheld were prepared at the direction of outside counsel or contain “mental impressions, conclusions, and theories of persons engaged in preparing litigation” rather than documents that would be prepared in the ordinary course of an accident investigation by an insurance company. Therefore, Defendant’s Motion to Compel documents withheld on this basis is **CONDITIONALLY GRANTED**.

Although Plaintiff failed to support its bases for withholding the documents listed on the April 2014 Privilege Log, the Court acknowledges that Plaintiff subsequently has produced some of these documents and may have an arguable basis to withhold others. The Court will allow Plaintiff one last opportunity to update its privilege log consistent with this Order, withholding

only documents that are (1) confidential communications between attorney and client providing or requesting legal advice or (2) documents that were prepared in anticipation of litigation and contain protect the “mental impressions, conclusions, and theories of persons engaged in preparing litigation.” Plaintiff is instructed to submit its updated privilege log along with the documents described to the Court within five (5) business days of this Order for *in camera* review.

ACCORDINGLY, Defendants’ Motion to Compel Against Plaintiff is **GRANTED** and Plaintiff is ordered to update its privilege log and provide both the privilege log and all documents described therein to the Court for *in camera* review within five (5) business days of this Order.

SO ORDERED this 24th day of July, 2014.



ELIZABETH E. LONG, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

Copies to:

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